BEFORE THE UTAH STATE TAX COMMISSION

PETITION TO AMEND RULE R884-24P-62, VALUATION OF STATE ASSESSED UNITARY PROPERTIES PURSUANT TO UTAH CODE ANN. § 59-2-201 (REGARDING CERTAIN CABLE TELEVISION COMPANIES)	))))))	FINAL ORDER

On June 27, 2008, Qwest Corporation ("Qwest"), through its counsel, David J. Crapo, petitioned the Tax Commission to amend Rule R884-24P-62 ("Rule 62") to include certain cable television companies in the categories of taxpayers whose operating property is assessed by the Tax Commission for property tax purposes.

Public notice of the proposed rulemaking was issued on July 18, 2008. Various public comments were received which are a part of the Commission's formal hearing record.

A public hearing was held on August 12, 2008, at which presentations were heard from Mr. Crapo, representing Qwest, Mr. Doug Foxley, representing the Utah Cable TV Association, Mr. Jerold Oldroyd, representing Comcast Cable ("Comcast"), Mr. Douglas Mo, representing Comcast and Time Warner Cable, Mr. Lee Gardner, representing the Utah Association of Counties, Mr. John McCarrey, representing the State Tax Commission Property Tax Division, and Mr. Roger Tew, representing the Utah League of Cities and Towns. In addition, written comments were received from several interested parties. The minutes from the hearing and copies of all written comments are retained in the Commission record and are available for inspection by any interested party.

At the hearing Comcast was asked to present additional written information to the Commission. That information was submitted on August 27, 2008. Qwest was granted the opportunity to respond and its response was submitted on September 17, 2008. Copies of those submissions are also available for review in the Tax Commission record.

After careful consideration of the petition and the comments received at the hearing and thereafter, the Commission declines to amend Rule 62 for the reasons set out below.

Governing Law

Article XIII, Section 6(3)(b) of the Utah Constitution requires the Tax Commission to "assess mines and public utilities and have such other powers of original assessment as the Legislature may provide by statute. . . ."

Utah Code Ann. § 59-2-201(1)(a) requires the Commission, with exceptions not relevant here, to assess "all property which operates as a unit across county lines, if the values must be apportioned among more than one county or state. . . . "

The Commission has promulgated Rule R884-24P-62 ("Rule 62") to implement the statutory mandate.

Rule 62(2)(d) defines "unitary property" as "operating property that is assessed by the Commission pursuant Section 59-2-201(a) through (c).

Rule 62(2)(d)(i) further defines "unitary properties" to include "(A) all property that operates as a unit across county lines, if the values must be apportioned among more than one county or state; and (B) all property of public utilities as defined in Section 59-2-102.

Rule 62(2)(d)(ii) provides that such unitary properties are defined under various categories including "telecommunications properties."

Rule 62(2)(d)(ii)(A) defines "telecommunications properties" to "include the operating property of local exchange carriers, local access providers, long distance carriers, cellular telephone or personal communication service (PCS) providers, pagers, and other similar properties."

Qwest's Arguments

Qwest's petition asked the Commission to amend Rule 62 to provide that "cable companies . . . which are used to facilitate two-way communications" should be included in the definition of unitary properties subject to assessment by the State Tax Commission. Presumably, not all cable television companies provide two-way communications. Cable television companies that do not provide such services would not be included in the proposed rule amendment. For ease of reference, the term "cable companies" will be used herein to refer only to cable television companies that would be covered by the proposed amendment.

At the hearing, Qwest clarified that it believed that cable companies should be centrally assessed because they operate as a unit across county lines and thus meet the requirements of § 59-2-201(1)(a). Qwest does not argue that the cable companies are public utilities subject to central assessment under § 59-2-201(1)(b).

Qwest provided evidence, primarily from press releases, regulatory filings, and other documents of Comcast[1], that indicated that Comcast provides voice and data telephone services. Comcast's website (www.comcast.com) states that "Comcast Digital Voice provides unlimited nationwide direct-dial calling from your home . . . ." In other documentation, Comcast claims to be "the fourth-largest residential phone service provider in the United States." These services may originate and terminate in cable customers' homes, but much of the communications pathway is over the internet. Thus, these services are generically referred to as "voice over internet protocol" or "VoIP" services.

Because those calling services are nationwide, Qwest argues that Comcast clearly operates as a unit across county lines within the meaning of § 59-2-201(1)(a) and that it clearly owns "telecommunications properties" as defined in Rule 62(2)(d)(ii)(A).

Comcast's Arguments

Comcast did not refute any of the facts regarding its telecommunications operations outlined above. It did note, however, that only two percent (2%) of its tangible personal property is used to provide VoIP service.

Comcast argues, however, that the petition should be dismissed because Qwest lacks standing to petition for the rule change. It argues that Qwest has shown no harm from the fact that it is centrally assessed while Comcast is locally assessed.

Comcast also argues that the issue of "convergence" is an issue of nationwide importance that should be addressed by legislators and regulatory agencies at the federal and state level. "Convergence" refers to the fact that traditional land line telephone companies, cell phone companies, cable television companies, internet service providers, and perhaps other types of entities are increasingly providing competing packages of services to the same prospective customers. Legislators and regulators are struggling to ensure that those differing entities can compete on a level playing field, regardless of the different regulatory environments in which they operate. Comcast argues that it is premature for the Commission to address the proposed rule change when there are significant policy issues yet to be resolved at the federal level and by the state legislature.

More specifically, the issue of possible central assessment of cable television companies was considered, at some level, by the Utah State Legislature in 2008. Comcast argues that the legislature is the appropriate body to decide this issue. Public comment received from various members of the public, including Senator Curtis Bramble, the Utah Senate Majority Leader, and Senator Wayne Niederhauser, the Chair of the Senate Revenue and Taxation Committee, echo this concern.

Finally, Comcast argues that it is primarily a cable television company that provides cable television service to its customers pursuant to local franchise agreements

[1] The record does not contain information on how many cable companies operate in Utah or how many of those companies, if any, also provide telecommunications services.

with local governments. Those local governments have the right to condition those franchises on "quality of service" standards and other requirements and they may revoke those franchises if the standards are not met. Comcast argues, therefore, that it is effectively operating hundreds, if not thousands, of local franchises, which individually do not cross county lines. Comcast argues that it is analogous to an interstate retail business that has centralized warehousing and administration, but whose individual local retail stores are each subject to local assessment. In public comment, the Utah League of Cities and Towns supported this contention and argued that central assessment of these properties could in some way impair local governments' efforts to protect their rights in the state and national "convergence" debates.

Other Arguments

Other public comments were received and considered. The bulk of these comments argued that cable television should not be subjected to double taxation, that taxes should not be increased on cable television or, at least, that taxes on cable television should not be increased without concerted action by the Legislature.

DISCUSSION

Standing. We decline to dismiss the petition because of lack of standing. We may accept, as a general rule, the proposition that one taxpayer does not have standing to challenge another taxpayer's taxes.[2] In this case, however, the issue is not the amount of anyone's tax liability. The issue is whether the Tax Commission is properly fulfilling its constitutional or statutory mandate and whether the Tax Commission is fairly and uniformly applying existing statutes. These issues are of significant interest to the public, the taxpayers, our own Property Tax Division and, frankly, the Commissioners[3] themselves.

Valuation and tax burden. We also disagree with the argument, made by various commentators, that the proposed amendment should be rejected because taxes on Comcast will be increased by the proposed change without appropriate legislative action. The only issue in the rule is whether the properties in question should be centrally or locally assessed. Thus the question is not how much the value should be, and by implication the property taxes, but who determines that value. Whether the Tax Commission or a County Assessor undertakes the valuation assignment, the result should be the same—fair market value.

---

[2] A taxpayer does have standing to argue that its property is being unfairly taxed in relation to comparable properties, whether under the equal protection clause of the federal or state constitution, the uniformity clause of the Utah Constitution (Art. XIII, Sec.2(1)), or state statute (Utah Code Ann. §§ 59-2-1004(4)(f) and 1006(4)). The usual remedy in those cases is to lower the taxpayer's value, although equal protection requirements may be satisfied by raising all comparable properties. See *McKesson Corp. v. Div. of Alcoholic Beverages*, 496 U.S. 18 (1990).

[3] We note that Commissioner Dixon Pignanelli is recused from participation in this matter and is not included in this reference.

We recognize that the county assessors, in many cases, apply different methodologies than those applied by the Tax Commission on unitary properties. Both taxpayers and counties have argued, from time to time, that the differing methodologies result in either an undervaluation or an overvaluation of the properties in question. It is incumbent on both the Tax Commission and the counties, under the vigilance of the taxpayer whose property is being valued, to try to arrive at fair market value in every case. It is possible, if not likely, however, that the rule change would result in a different value for certain cable companies' properties, because different methodologies would probably be employed. Whether those different methodologies would increase or decrease the value, however, is merely speculative. In no event would the change of assessing body result in double tax.

Local franchise. We also reject Comcast and various commentators' claims that the petition should be rejected because Comcast operates pursuant to local franchises. The argument would need to be addressed more fully if the petition was seeking central assessment of cable television companies in general. Difficult questions of interpretation and application may then be required and we would need more information on the actual structure and operation of cable companies.

The petition before us, however, does not seek central assessment of all cable companies. It seeks central assessment of the cable companies that are also actively providing nationwide telecommunications services. Although the cable itself may be placed in a prospective customers home pursuant to a local franchise agreement, the service in question is not local cable television service. It is nationwide telecommunications service. The issue of assessment of a local cable telecommunication provider, merely providing local cable service, is not implicated by the proposed rule change.

Telecommunication service provider. As noted above, Qwest's allegation that Comcast is engaged in providing a nationwide telecommunications service is fully supported by documentation originating with Comcast itself. That contention was not seriously contested by Comcast. Thus, the Commission finds that a portion of Comcast's business—the VoIP service—is being conducted across county lines. As such, it appears that Comcast's telecommunication properties should be subject to central assessment.

We accept as uncontroverted, however, Comcast's assertion that only two percent of its properties are involved in providing VoIP service. The vast majority of Comcast's properties are used in providing traditional cable television service which would remain subject to local assessment under the proposed rule change. Although the relative amount is small, however, the assets are not easily divisible into the two categories. The same cable drop that enables cable service to a home also carries the VoIP communications. Under the proposed rule, it would not be sufficient for the Commission to assess certain pieces of equipment and the counties to assess others. Difficult questions of allocation would be presented. A portion of a cable drop, for example, might be valued by the assessor and taxed by the county. A much smaller portion of the cable drop, however, would be considered part of the unitary communications business and would be included in a unitary value that would then be apportioned and allocated among all the entities where the unitary business is conducted.

This result may eventually be required under the current statutory scheme. We do not believe it is required, however, when only two percent of the properties are implicated. Taxation is not a matter of mathematical precision. To require central assessment of Comcast, at the current level of its telecommunications business, would allow the telecommunications tail to wag the cable television dog. It would introduce a level of complexity into tax compliance and administration that would not be justified by the relatively small portion of the properties actually involved. Accordingly, we decline to adopt the proposed amendments to the rule at this time.

Convergence. Although we do not have the power to bind future Commissioners, the implications of our decision are clear. If conventional wisdom is correct, convergence will continue and probably accelerate. If so, and if Comcast's apparent marketing strategy is successful, the portion of its assets engaged in VoIP services will increase. At some point, we believe the current statutory scheme will require Comcast's telecommunications properties to be centrally assessed. We express no opinion on what that point will be. We merely find that two percent is insufficient. As interested parties are considering solutions to the many regulatory and competitive implications of convergence, they may want to consider the implications of our decision as well.

ORDER

For the foregoing reasons, Qwest's petition to initiate rulemaking and amend Rule 62 is denied.

DATED this 9th day of October, 2008.

Pam Hendrickson
Pam Hendrickson
Chair

R Bruce Johnson
R. Bruce Johnson
Commissioner

Marc Johnson
Marc B. Johnson
Commissioner

Recused

D'Arcy Dixon Pignanelli
Commissioner